Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

vs.

DAVID POWELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DICK THORNBURGH
JOHN P. KRILL, JR. *(Counsel of Record)*
LINDA J. SHOREY
DAVID R. FINE

KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PA 17101
(717) 231-4500
Counsel for Petitioners

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-2096

DAVID POWELL; SHELEAN PARKS; PATRICE EVERAGE; JULIA A. DAVIS; YVETTE BLAND; GERALDINE NEWTON; MARIA M. RIVERA; MARY E. MILLER; GREGORY LUZAK; CATHERINE LUZAK; FU-ZHEN XIE; THE BLACK CLERGY OF PHILADELPHIA AND VICINITY; PHILADELPHIA BRANCH NAACP; ASPIRA, INC. OF PENNSYLVANIA; PARENTS UNION FOR PUBLIC SCHOOLS; CITIZENS COMMITTEE ON PUBLIC EDUCATION IN PHILADELPHIA; PARENTS UNITED FOR BETTER SCHOOLS; DAVID W. HORNBECK, SUPERINTENDENT, The School District of Philadelphia; FLOYD W. ALSTON, PRESIDENT, Board of Education of the School District of Philadelphia; BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA; THE SCHOOL DISTRICT OF PHILADELPHIA; EDWARD G. RENDELL, MAYOR, City of Philadelphia; CITY OF PHILADELPHIA

PHILADELPHIA FEDERATION OF TEACHERS LOCAL 3; TED KIRSCH, PRESIDENT, GUARDIAN AD LITEM,

Intervenors in D.C.

v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; JAMES P. GALLAGHER,

CHAIRPERSON, Commonwealth of Pennsylvania State Board of Education; EUGENE W. HICKOK, SECRETARY OF EDUCATION; BARBARA HAFER, TREASURER

MATTHEW J. RYAN; ROBERT C. JUBELIRER; JESS M. STAIRS; JAMES J. RHOADES,

Intervenors in D.C.

Before: SLOVITER and MANSMANN, Circuit Judges and WARD, District Judge

(Filed: August 25, 1999)

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Before us is an appeal by plaintiffs, including eleven parents of children who attend public schools in Philadelphia suing on their own behalf and that of their children (hereafter "school children"), from the order of the United States District Court for the Eastern District of Pennsylvania dismissing their complaint under Federal Rule of Civil Procedure 12. The complaint challenges the practices of the Commonwealth of Pennsylvania in funding public education as having a racially discriminatory effect. This appeal requires us to consider whether a private plaintiff may state a claim under a regulation implementing Title VI, whether the complaint adequately states a claim under that regulation, and whether a claim may be maintained under 42 U.S.C. § 1983 for violation of that regulation.

I.

On March 9, 1998, a diverse group of plaintiffs filed suit against several Pennsylvania officials, alleging in Count I the violation of the regulation the Department of Education (DOE) adopted to implement Title VI of the Civil Rights Act of 1964, and in Count II a violation of 42 U.S.C. § 1983. The parents of several Philadelphia public school children were joined as plaintiffs by the following six organizations that devote substantial resources to overcoming what they allege are the disparate and inadequate educational programs caused by the challenged practices: (1) The Black Clergy of Philadelphia and Vicinity; (2) Philadelphia Branch NAACP; (3) ASPIRA, Inc. of Pennsylvania; (4) Parents Union of Public Schools; (5) Citizens Committee on Public Education in Philadelphia; and (6) Parents United for Better Schools. Also joining as plaintiffs were several local officials and entities: (1) the School District of Philadelphia; (2) its superintendent, David W. Hornbeck; (3) its Board of Education; (4) the Board's president, Floyd W. Alston; (5) the City of Philadelphia; and (6) the City's mayor, Edward G. Rendell. These original plaintiffs were later joined without objection by intervenors the Philadelphia Federation of Teachers Local 3 AFT AFL-CIO, and Ted Kirsch as Guardian ad Litem.

The complaint names as defendants four state employees in their "official and individual capacities": Thomas J. Ridge, Governor of the Commonwealth of Pennsylvania; Dr. James P. Gallagher, Chairperson of the Board of Education of the Commonwealth of Pennsylvania; Dr. Eugene W. Hickok, Secretary of Education; and Barbara Hafer, Treasurer, (the "executive defendants"). Four Commonwealth legislative leaders,

Representative Matthew J. Ryan, Senator Robert C. Jubelirer, Representative Jess M. Stairs, and Senator James J. Rhoades, joined as intervenor defendants ("legislative defendants").

All of the plaintiffs seek two forms of relief: (1) "a declaration that the defendants 'through their funding policies and practices, discriminate against African-American, Hispanic, Asian and other minority students in the School District and the City'" in violation of the administrative regulation promulgated under Title VI and (2) "an injunction prohibiting defendants prospectively 'from continuing to implement a system of funding public schools that discriminates against . . . minority children enrolled in' the School District 'and that thereby harms' all plaintiffs." Appellants' Br. at 16. The school children and organizations also seek "a declaration that [the] funding policies and practices deprive them of the rights, privileges and immunities secured by the laws of the United States, in violation of § 1983." Appellants' Br. at 16.

On May 4, 1998, the original defendants filed a motion to dismiss the complaint under Rule 12(b)(6). In June, the United States filed a brief amicus curiae in support of the plaintiffs. On July 6, 1998, the intervening defendants also filed a Rule 12(b)(6) motion to dismiss. The United States then filed a second brief amicus curiae. The original defendants and the intervening defendants each filed a second motion to dismiss after the Supreme Court dismissed its grant of certiorari in *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), vacated as moot, 119 S. Ct. 22 (1998). Certiorari had been sought on this court's holding in *Chester Residents* that an implied private right of action exists under the regulations promulgated under Title VI. In

response to the four motions to dismiss, plaintiffs requested oral argument and/or a status conference, and the United States notified the District Court that it intended to file an additional amicus brief addressing the *Chester Residents* decision. The District Court, however, dismissed the complaint for failure to state a claim without holding the requested status conference, hearing oral argument, or waiting to receive the government's third amicus brief.

Our review of a district court's dismissal of a complaint is plenary. *See Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993). We apply the same test the district court should have used initially. *See Holder v. City of Allentown*, 987 F.2d 188, 193 (3d Cir. 1993). We will not uphold a dismissal for failure to state a claim if, "under any reasonable reading of the pleadings, plaintiff may be entitled to relief." *Id.* at 194. In reviewing the plaintiff's complaint, "[w]e are required to 'accept as true the facts alleged . . . and all inferences that can be drawn therefrom.'" *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3d Cir. 1992) (*en banc*) (quoting *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990)).

II.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. The Supreme Court has held that section 601 of Title VI prohibiting exclusion or discrimination from federal programs on account of race, color or national origin prohibits only intentional discrimination. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983).

However, another provision of Title VI, section 602, "authorize[s] and direct[s]" federal departments and agencies that extend federal financial assistance to particular programs or activities "to effectuate the provisions of section 2000d [section 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. At least 40 federal agencies have adopted regulations that prohibit disparate-impact discrimination pursuant to this authority. *See Guardians*, 463 U.S. at 619
(Marshall, J. dissenting).

The Department of Education, in exercising its statutory authority under section 602, promulgated such a regulation, codified as 34 C.F.R. § 100.3(b)(2), which prohibits a funding recipient from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program as respects individuals of a particular race, color, or national origin." Id. Count I of the complaint before us is based on this regulation prohibiting discriminatory effects in educational programs.

A.

The District Court held that the complaint fails to state a claim under Title VI[1] or the Department of Education's Title VI regulations because it does not adequately allege that a specific element of the Commonwealth's funding practices adversely and disproportionately affects students of a particular race. *Powell v. Ridge*, No. 98-1223, slip op. at 32 (E.D. Pa. Nov. 18, 1998). Plaintiffs challenge this holding on appeal, insisting that their complaint meets the applicable pleading standard.

Although the Supreme Court has not yet spoken on the issue, the courts of appeals have generally agreed that the

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[1] The District Court read the complaint as alleging a violation of Title VI. At oral argument, the plaintiffs' counsel acknowledged that the complaint does not have a separate count under the statute, although it does allege that defendants adopted their different funding methodologies with knowledge of the racially discriminatory consequences. Counsel noted that in a recent decision, *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999), the Supreme Court held that in some circumstances a school district's deliberate indifference to sexual harassment of which it had knowledge amounts to an intentional violation of Title IX. Counsel here argued that there is a spectrum between the extremes of intentional discrimination and discriminatory effect. It appears that plaintiffs suggest that with discovery they may be able to make a case of intent under Title VI comparable to that which the Court accepted in Davis as meeting the intent requirement under Title IX. Without deciding whether a variation of the Davis standard applies here, we believe that plaintiffs have made adequate allegations to survive a motion to dismiss and justify discovery. We note that plaintiffs here recognized that "allegations of racial discrimination are very serious." Plaintiffs should not be penalized for their scrupulousness in declining to include allegations against elected officials concerning conduct that they suspect but of which they currently have no direct proof.

parties' respective burdens in a Title VI disparate impact case should follow those developed in Title VII cases. *See, e.g., New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 828-29 & n.12 (7th Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); cf. *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1333 (3d Cir. 1981) (*en banc*) (accepting without comment parties' suggestion that "the decisional law allocating the burden of production and persuasion under Title VII is instructive in [a Title VI] case"). Thus, a plaintiff in a Title VI disparate impact suit bears the initial burden of establishing a prima facie case that a facially neutral practice has resulted in a racial disparity. *See Ferguson v. City of Charleston*, ___ F.3d ___, 1999 WL 492681 (4th Cir. July 13, 1999); *New York Urban League*, 71 F.3d at 1036; *Elston*, 997 F.2d at 1407. If the plaintiff meets that burden, then the defendant must establish a "substantial legitimate justification," *see New York Urban League*, 71 F.3d at 1036, or a "legitimate, nondiscriminatory reason[ ]," *Medical Ctr. Inc.*, 657 F.2d at 1331, for the practice. *See Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). Once the defendant meets its rebuttal burden, the plaintiff must then establish either that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination. *See Georgia State Conference*, 775 F.2d at 1417.

At trial, a Title VI disparate impact plaintiff cannot meet the burden of establishing a prima facie case without proving "that the defendants' racially neutral practice detrimentally affects persons of a particular race to a greater extent than other races." *Id.* at 1421. It is not

enough for the plaintiff "merely [to] prove circumstances raising an inference of discriminatory impact at issue; [the plaintiff] must prove the discriminatory impact at issue." *Johnson v. Uncle Ben's Inc.*, 657 F.2d 750, 753 (5th Cir. 1981).

The burden a Title VI plaintiff must meet to survive a motion to dismiss, however, is much less onerous. To survive a motion to dismiss, all that the plaintiff must do is plead that a facially neutral practice's adverse effects fall disproportionately on a group protected by Title VI. The Court of Appeals for the Eighth Circuit explained in *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (8th Cir. 1993): "the prima facie case under [disparate impact] analysis is an evidentiary standard -- it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination . . . . Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim." *Id.* at 926. Furthermore, as the Supreme Court has stated, "[w]hen a federal court reviews the sufficiency of a complaint . . . [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); accord *Lake v. Arnold*, 112 F.3d 682, 688 (3d Cir. 1997).

The complaint in this case states, *inter alia*:

> The Commonwealth Defendants' funding system for education gives school districts with high proportions of white students on average more Commonwealth treasury revenues than school districts with high

> proportions of non-white students, where the levels of student poverty are the same.

App. at 37-38.

> When Commonwealth treasury revenues per pupil are analyzed by the amount of poverty in school districts across the Commonwealth . . . school districts with higher proportions of non-white students receive less Commonwealth treasury revenues than districts with higher proportions of white students.

App. at 38-39.

> On average, for 1995-96, for two school districts with the same level of poverty . . . the school districts with higher non-white enrollment received $52.88 less per pupil for each increase of 1% in non-white enrollment.

App. at 39.

> The Commonwealth's funding policies and practices disadvantage . . . students in [underfunded] districts . . . . The foreseeable result [of the funding policies] has been serious impairment of the educational opportunities of the students in the School District, including the Student Plaintiffs. Lack of sufficient resources in the School District results, *inter alia*, in larger class sizes and higher pupil-to-teacher ratios than in surrounding school districts; reduced curricula; cuts in and elimination of programs and electives and advanced placement courses, shortages of textbooks and use of outdated textbooks; shortages of equipment, supplies and technology; spartan physical education and extracurricular programs; lack of librarians and

> library services; insufficient numbers of counselors and psychologists; and many inadequate and crumbling physical facilities.

App. at 40-41.

These allegations are sufficient to put the defendants on notice that the plaintiffs will attempt to prove (1) that less educational funding is provided by the Commonwealth to school districts attended by most non-white students in Pennsylvania than to school districts attended by most white students, (2) that the school districts attended by most non-white students in Pennsylvania receive less total educational funding than do the school districts attended by most white students,[2] (3) that these disparities in funding are produced by the Commonwealth's funding formula, and (4) that the funding disparities injure non-white students by limiting their educational opportunities. Although the language of the complaint may not always be precise or its thrust clear, we nonetheless believe that plaintiffs' allegations provide more than sufficient notice to meet the pleading standard. We therefore hold that the plaintiffs should be given the opportunity to offer evidence in support of their claims.

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[2] In their reply brief, the plaintiffs state, "The Complaint alleges adverse racial impact in both the distribution of Commonwealth treasury revenues and the allocation of total public school funding dollars in Pennsylvania, for which the Commonwealth is statutorily and constitutionally responsible. *See, e.g.*, J.A. 35-39, ¶¶ 47, 52, 56, 57." Appellants' Reply Br. at 24. Although a liberal reading of the paragraphs cited appears to support plaintiffs' statement, if there is any disagreement as to whether the complaint does so allege, it can be resolved by amendment.

Whether they will ultimately be entitled to prevail is a very different question on which we express no opinion.

The District Court's contrary conclusion that the plaintiffs' complaint does not meet the pleading standard rests on a mischaracterization of the complaint. The District Court described the complaint as alleging that "the uniformly applied state formula for allocating basic education funds among the 501 school districts does not bring about the same results in Philadelphia as it might in another, more affluent district. . . ." *Powell*, slip op. at 29. This characterization suggests that the disparity the plaintiffs have pled is one based on economic circumstances rather than race. However, the complaint specifically alleges that the disparity in funding cannot be explained by reference to relative wealth or poverty because the disparities are present when districts of the same poverty level are compared. *See, e.g.*, App. at 37-39.

The District Court also stated that "the Plaintiffs want the School District to get more than the statutory formula provides under the theory that factors external to the state subsidy program make education more expensive or funding shortfalls greater in Philadelphia." *Powell*, slip op. at 32. This misstates the plaintiffs' request. Notwithstanding the District Court's characterization, the plaintiffs do not rely on any factors external to the state subsidy program in seeking more funding than is provided under the statutory formula. According to their allegations, they seek more funding on the ground that the formula provides minority school districts[3] with less funding than it

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[3] The complaint focuses on the Philadelphia School District which is alleged to have a 77% to 80% minority student body. Plaintiffs allege

does similarly situated non-minority districts, regardless of the cost of education.

Because these mischaracterizations affected the District Court's decision and because a review of the complaint establishes that the complaint, when not mischaracterized, meets the pleading standard, we must reverse.

Defendants argue that the complaint fails to state a claim because it compares the effect of the funding formula on school districts rather than its effect on individuals. Unquestionably, under Title VI and 34 C.F.R. § 100.3(b)(2), the disparate impact complained of must fall on an individual rather than on a school district. Plaintiffs, cognizant of that requirement, have alleged that the Commonwealth's funding system results in proportionately less funding per child to school districts with high proportions of non-white students than to school districts with high proportions of white students. They argue that the effect of less funding per student is larger class sizes, higher pupil per teacher ratios, reduced curricula, fewer programs, and less textbooks, equipment, supplies, and technology per student than received by school districts with proportionately more white students. While it may ultimately be more difficult to prove the impact, and consequently the disparate impact, on the school children because the funding is directed to the school districts, that potential difficulty does not justify denying plaintiffs the opportunity to prove the effect alleged.

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that there are eleven other school districts in Pennsylvania with student bodies composed of more than 50% minorities.

Defendants also argue that plaintiffs' comparisons of school districts are invalid because there are some white students in the allegedly disadvantaged minority school districts and some non-white students in the allegedly advantaged white school districts. Defendants' position was made explicit at oral argument when their counsel stated that in order to show an adverse effect, "It's my position that [plaintiffs] have to show that 100 percent [of the minority students] are, in fact, adversely affected." Transcript of Oral Argument at 53. We know of no authority that imposes such a requirement. The regulation merely prohibits "the effect of subjecting individuals to discrimination because of their race." If plaintiffs succeed in their attempt to show disparate effect resulting from the challenged funding practices, the number of non-white school children affected might be relevant to the factfinder's determination whether the adverse effect is "because of their race." We have never held, however, that as a matter of law the practice complained of must affect a certain minimum percentage of the minority group to justify a finding that the discrimination is because of race.

In addition, defendants complain that plaintiffs only compare subsets of school districts, selected by reference to such factors as poverty, proximity to the School District, or "high proportion" of minority school children (sometimes described as 75% or more minority enrollment). Specifically, defendants contend that plaintiffs never "compare the total revenues of all minority districts, however defined, with the total revenues of all majority districts [presumably per student]." Executive Defendants' Br. at 22. We need not determine here whether the particular comparisons plaintiffs make in their complaint are either necessary or sufficient to prove disparate impact. The relevance and validity of these comparisons goes to the

merits of plaintiffs' case, not to the maintenance of their complaint, and should be determined only upon a developed record.

Finally, defendants contend that the complaint is insufficient because it fails to identify a particular part of the funding formula as producing the disparate impact. This argument assumes without justification that it is a portion of the formula and not the formula as a whole that produces the alleged effects. Moreover, it would be a daunting hurdle were plaintiffs required at the pleading stage, before answers have been filed and before discovery, to identify what specific portion or portions of the Commonwealth's complex funding formula is responsible for the alleged inequality. We note that there are many components to the Commonwealth's formula, which the plaintiffs allege was changed each year between 1991-92 and 1996-97. Indeed, even after requesting and receiving supplemental briefs from the parties concerning that formula, we remain unable to discern with precision the basis on which the Commonwealth funds the school districts. It may be that some of the necessary information will be forthcoming from the defendants' files and employees during discovery.

Under these circumstances, we conclude that the plaintiffs did not need to identify in the complaint a particular portion of the formula as objectionable in order to plead a disparate impact claim. To survive a motion to dismiss, plaintiffs need merely plead sufficient allegations to put the defendants on notice of what they intend to prove at trial. The defendants in this case are on notice that plaintiffs intend to prove that their funding formula produces disparate effects, and the defendants are in as

good a position as anybody to know precisely what that funding formula entails.

B.

Defendants argue that we should uphold the District Court's decision on the alternate ground that Title VI regulations do not provide a private right of action. It is by now well established that implication of a private right of action for a statute requires analysis of the factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975). The *Cort* factors ask:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"-- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted). A similar analysis which incorporates the *Cort* factors is appropriate in determining whether to infer a private right of action from an agency rule or regulation. *See Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939 (3d Cir. 1985).

In *Chester Residents*, 132 F.3d at 927, a decision that has since been vacated as moot, this court considered the issue before us here, "whether a private right of action exists under discriminatory effect regulations promulgated

by federal administrative agencies pursuant to section 602 of Title VI." Although the plaintiffs there had contended that the Supreme Court's decisions in *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), establish the existence of a private right of action under the regulations, we rejected that contention. We noted that although five Justices implicitly endorsed the existence of a private right of action in those cases, the Supreme Court never directly addressed the issue. *See Chester Residents*, 132 F.2d at 929-33.

We also rejected the suggestion of the defendants that our discussion in *Chowdhury v. Reading Hospital and Medical Center*, 677 F.2d 317 (3d Cir. 1982), regarding the requirements for a claim of intentional discrimination under section 601 of Title VI necessarily means that there is no private right of action under section 602 of the Act. We thus found no direct authority confirming or denying a private right of action under the Title VI regulation. *Chester Residents*, 132 F.3d at 931.

We then proceeded to apply the *Angelastro* analysis to decide whether such a right of action should be inferred. In *Angelastro*, we applied a three-pronged test in"[d]eciding whether to imply a private right of action from an agency rule." First, a court must ascertain whether a private right of action exists under the statute under which the rule was promulgated. *See id.* "If under *Cort v. Ash* and its progeny, a court finds that Congress did not intend the statute to be enforced by private actions, then the inquiry is concluded." *Id.* Otherwise, two further inquiries must be made: "whether the agency rule is properly within the scope of the enabling statute" and "whether implying a

private right of action will further the purposes of the enabling statute." *Id.*

In *Chester Residents*, we quickly resolved the inquiry into the second and third prongs of *Angelastro*. We determined that the agency rule is properly within the scope of Title VI because in its unanimous opinion in *Alexander* the Supreme Court stated that "'actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI.'" *Chester Residents*, 132 F.3d at 933 (alteration in original) (quoting *Alexander*, 469 U.S. at 293).

We also concluded that the third prong – whether implying a private right of action under the disparate impact regulations will further the purposes of Title VI -- was also satisfied. Title VI's purposes are to "(1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination." *Id.* at 936 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979)). Therefore, we reasoned, "a private right of action will increase enforcement," and we concluded that such increased enforcement will further Title VI's purposes, compensating for the agency's lack of sufficient resources to adequately enforce the regulation itself. *Chester Residents*, 132 F.3d at 936.

The *Angelastro* prong to which we devoted the most attention in *Chester Residents* was the first inquiry, which asks whether the statute under which the regulation was promulgated (here Title VI) properly permits the implication of a private right of action. We analyzed this prong in *Chester Residents* in terms of the *Cort* factors and

determined that the Title VI regulations create federal rights in favor of individual plaintiffs (the first *Cort* factor), and that "there is some indication in the legislative history . . .of an intent to create a private right of action" (the second *Cort* factor). *See Chester Residents*, 132 F.3d at 933 n.10, 934. We further held that implying a remedy for the plaintiffs is consistent with the underlying purposes of the legislative scheme (the third factor), reasoning:

> The procedural requirements in section 602 provide a fund recipient with a form of notice that the agency has begun an investigation which may culminate in the termination of its funding. We note that a private lawsuit also affords a fund recipient similar notice. If the purpose of the requirements is to provide bare notice, private lawsuits are consistent with the legislative scheme of Title VI. Furthermore, unlike the EPA, private plaintiffs do not have authority to terminate funding. As a result, the purpose that the requirements serve is not as significant in private lawsuits, where the potential remedy does not include the result (i.e., termination of funding) at which Congress directed the requirements. Stated differently, the requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate.

Id. at 935-36 (footnote omitted). Finally, the last *Cort* factor -- whether the cause of action is one traditionally relegated to state law, in an area basically the concern of States -- was deemed "irrelevant because Title VI is federal law." *Id.* at 933 n.10.

We need not take this somewhat circuitous route to analyze the first *Angelastro* factor in the inquiry we make

here. In *Angelastro*, we explained that the initial inquiry focuses on whether the statute implemented by the regulation contains an implied private right of action: "Where the enabling statute authorizes an implied right of action, courts should permit private suits under agency rules within the scope of the enabling statute if doing so is not at variance with the purpose of the statute. . .. [I]f Congress intended to permit private actions for violations of the statute, 'it would be anomalous to preclude private parties from suing under the rules that impart meaning to the statute.'" 764 F.2d at 947.

As noted above, the regulation at issue here, although promulgated by the Department of Education under section 602 of Title VI, implements section 601 of Title VI. *See* 42 U.S.C. § 2000d-1 (authorizing regulation "to effectuate the provisions of section 2000d of . . . title [42]"). The Supreme Court precedent and our cases firmly establish that section 601 of Title VI gives rise to an implied right of action, at least for purposes of securing injunctive relief. *See Guardians*, 463 U.S. at 593-95 (Opinion of White, J.); *Cannon*, 441 U.S. at 694-703, 710-16; *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 737 (3d Cir. 1983); *NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247, 1248, 1250 n.10 (3d Cir. 1979). It therefore follows that the first prong of *Angelastro* is satisfied. We are persuaded by the analyses in *Chester Residents* that the second and third prong of *Angelastro* are also met.

Our conclusion is in keeping with the decisions of the other courts of appeals that have addressed this issue. The Eleventh Circuit has explicitly "recognized an implied private right of action to enforce the regulations promulgated under section 602 of Title VI," thereby permitting private plaintiffs to "obtain injunctive or

declaratory relief by showing, *inter alia*, that the challenged action has 'a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.'" *Burton v. City of Belle Glade*, No. 97-5091, 1999 WL 425895 (11th Cir. June 25, 1999) (quoting *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993)); *see also Georgia State Conference*, 775 F.2d at 1417. At least four other federal courts of appeal have reached the merits of disparate impact claims brought by individual plaintiffs under the Title VI regulations, although without explicitly determining whether a private right of action exists thereunder. *See Villanueva v. Carere*, 85 F.3d 481, 486-87 (10th Cir. 1996) (affirming refusal to grant preliminary injunction on grounds that disparate impact had not been adequately shown); *New York Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995) (same); *City of Chicago v. Lindley*, 66 F.3d 819, 827-30 (7th Cir. 1995) (affirming grant of summary judgment to defendant on ground that disparate impact had not been adequately shown); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (affirming judgment for plaintiff on disparate impact claim following trial).

Defendants nevertheless argue that interpreting the Title VI regulation to provide a private right of action would contravene the Supreme Court's pronouncement in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that administrative regulations may not create federal law. There the Court stated, "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *See id.* at 213-14 (internal quotation marks omitted). Defendants

argue that because the Title VI regulation extends the conduct prohibited by Title VI to encompass disparate impact discrimination, whereas Title VI prohibits only intentional discrimination, a holding that private suits may be brought under the regulation would effectively permit administrative agencies to create substantive law.

Defendants' argument conflicts with the Supreme Court's own pronouncements. As previously noted, in *Guardians* five of the nine justices agreed that the administrative regulations incorporating a disparate impact standard are valid, *see* 463 U.S. at 584 n.2, 607 n.27, and thereafter the Court in *Alexander* characterized *Guardians* as so holding. *See Alexander*, 469 U.S. at 293 ("[*Guardians* held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI"). Obviously, the Supreme Court did not believe that administrative regulations that prohibit disparate impact were an impermissible creation of substantive law, even though in its own earlier opinion in *Guardians* the Supreme Court had held that Title VI itself did not extend that far. *See also United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (sustaining SEC regulation that prohibits more activities than statute on ground that "[a] prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited").

Moreover, numerous other appellate decisions have implied private rights of actions under regulations under similar circumstances. *See, e.g., Lowrey v. Texas A&M University System*, 117 F.3d 242 (5th Cir. 1997) (Department of Education regulations promulgated under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq.); *Robertson v. Dean Witter Reynolds*,

Inc., 749 F.2d 530 (9th Cir. 1984) (Securities and Exchange Commission Rule 10b-16, 17 C.F.R. § 240.16). In each of these cases, the analysis as to whether there was a private right of action to enforce the regulation at issue would not have been necessary if the regulation did not go further than that statute; the private right of action under the particular statute alone would have sufficed.

We therefore reject defendants' arguments that Count I of this complaint does not state a claim under the Department of Education regulation. We do not decide whether every allegation of Count I of the complaint states a viable claim under the Title VI regulation. Because the District Court misread the thrust of the complaint, it never parsed the allegations to ascertain how and whether they differ. We do not suggest that the complaint be dissected upon remand. We merely decide that there is at least one viable claim and that plaintiffs should be permitted to proceed to discovery after answers have been filed.

C.

Plaintiffs' second count invokes one of the Civil Rights Acts, 42 U.S.C. § 1983, to redress the defendants' alleged violation of the regulation. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a[ ] . . . proper proceeding for redress.

The District Court properly interpreted this statute to mean that "[a] § 1983 action has two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived a [citizen or other] person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Powell*, slip op. at 12 (emphasis added).

The District Court pretermitted any analysis of whether the complaint adequately alleges that the defendants deprived any person of rights secured by the laws of the United States within the scope of § 1983 because it held that the four defendants cannot be sued under that statute. First it held that "[a]s officials of the Commonwealth of Pennsylvania who have been sued for actions taken while in their official capacities, Ridge, Hickok and Hafer are not 'persons' under § 1983." *Id.* at 14. Then it held that Gallagher, who was sued solely for actions taken in his official capacity as the chairperson of the Commonwealth's Board of Education, is not a "person" who may be sued under § 1983 because the Board's funding comes directly from the Commonwealth and it is therefore "an arm of the state" immune from suit. *Id.*

The District Court's conclusions contravene the applicable Supreme Court precedent. When state officials are sued in their official capacities for damages, that suit is treated as one against the state and the official is not considered to be a "person." *See Will v. Michigan Dept. of State Police*, 492 U.S. 58, 71 & n.10 (1989). Hence, § 1983 cannot be invoked. On the other hand, when the § 1983 suit seeks damages against the state officials in their individual or personal capacities, it may be maintained (subject to any applicable immunity doctrine) even though

they acted in their official capacities in the matter at issue. *See Hafer v. Melo*, 502 U.S. 21, 27 (1991) ("A government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term 'person'").

A suit for damages must be contrasted with a suit for equitable relief. The Supreme Court has held that a state official sued for injunctive relief is a "person" under § 1983 because an action for prospective relief is not treated as a suit against the state. *See Will*, 491 U.S. at 71 n.10 ("[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" (quoting *Kentucky v. Graham*, 473 U.S. 19, 167 n.14 (1985)); *see also Edelman v. Jordan*, 415 U.S. 651, 666-74 (1974) (discussing *Ex parte Young*, 209 U.S. 123 (1908)).

The complaint in this case seeks only the equitable remedies of an injunction and declaratory relief. The conclusion that Ridge, Hickok, Hafer, and Gallagher are persons within the meaning of § 1983 is thus inescapable.

Perhaps not surprisingly, defendants have chosen not to defend the District Court's reasoning, arguing instead that the District Court's decision may be upheld on another ground. Notwithstanding our general reluctance to venture into areas the District Court did not consider, we consider this issue now as a matter of judicial expediency because the case will be remanded and it will undoubtedly arise again.

Defendants first argue that Title VI's "comprehensive enforcement scheme" precludes a § 1983 claim. Once a plaintiff has identified a federal right that has allegedly

been violated, there arises a "rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). The presumption is rebutted "if Congress 'specifically foreclosed a remedy under § 1983' . . . [either] expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984)).

Neither Title VI nor the regulation promulgated thereunder purports to restrict the availability of relief under § 1983. Defendants thus "must make the difficult showing that allowing a § 1983 action to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Id.* at 346 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)).

Only twice has the Supreme Court found a remedial scheme sufficiently comprehensive to supplant § 1983. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984). In both instances, the Supreme Court emphasized that the statutes that were held to be displaced themselves specifically provided aggrieved individuals with extensive statutory remedies. However, the Supreme Court has cautioned that "a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect plaintiff 's interests.'" *Blessing*, 520 U.S. at 347 (quoting *Golden State*, 493 U.S. at 347). On at least three occasions the Court found that an agency's authority to cut off federal funding was insufficient to justify the denial of a § 1983 remedy. *See Wright v. City of Roanoke Redevelopment and Housing*

Auth., 479 U.S. 418, 428 (1987); *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 521-22 (1990); *Blessing*, 520 U.S. at 347-48.

Cognizant of this guidance, we see no reason to hold that resort to § 1983 has been foreclosed here. Neither Title VI nor the Department of Education regulation establishes "an elaborate procedural mechanism to protect the rights of [individual plaintiffs]," as did the statute at issue in *Smith*, where the Court stated, "The [Act's] procedures . . . ensure that hearings [are] conducted by the state[and that these hearings are] fair and adequate," 468 U.S. at 1010-11 (interpreting the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.*). Nor is it possible to describe the administrative remedies Title VI and the regulations establish as "unusually elaborate," as the Court described the enforcement provisions of the pollution control statutes at issue in *Sea Clammers*. *See* 453 U.S. at 13. Indeed, the statutory scheme under Title VI does not specifically provide individual plaintiffs with any administrative remedy. *See Chowdhury*, 677 F.2d at 319 (noting that under the administrative enforcement mechanism Congress provided in section 602 of Title VI, "an aggrieved individual may file a complaint with the funding agency but has no role in the investigation or adjudication, if any, of the complaint" (footnotes omitted)).

Defendants nonetheless contend that we are constrained to hold that plaintiffs' claim under § 1983 may not coexist with Title VI because of our decisions in two Title IX cases: *Williams v. School District*, 998 F.2d 168 (3d Cir. 1993), and *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779 (3d Cir. 1990). In *Williams*, a male student brought suit alleging that the defendants violated Title IX by excluding him from the girls' field hockey team.

Williams' complaint also stated a claim under § 1983 and the Equal Protection Clause. On appeal, we reversed the grant of summary judgment to Williams on the Title IX claim, holding that disputed issues of material fact remained. We also vacated the district court's judgment for plaintiff on his constitutional claims brought under § 1983. We held that the district court should have refrained from deciding the plaintiff 's § 1983 action in keeping with "the Supreme Court's admonition that courts should exercise restraint before reaching federal constitutional claims." *Williams*, 998 F.2d at 176.

In *Williams*, we relied on our earlier opinion in *Pfeiffer*, where we upheld the district court's decision not to reach plaintiff 's constitutional claims of gender discrimination brought under § 1983 once it had decided that Pfeiffer's constitutional claims were "subsumed" within her Title IX claim.

Defendants contend that these cases stand for the broad proposition that all § 1983 claims are precluded by Title IX and argue that Title VI must be similarly interpreted. Those decisions cannot be interpreted that broadly. They concerned the interaction between a plaintiff's constitutional claims and statutory claims, and the holdings were predicated on the principle that courts should refrain from deciding constitutional issues unnecessarily. For example, in *Williams* we stated that the proper course in *Pfeiffer* was for the district court to "refuse[ ] to hear plaintiff 's section 1983 claim." *Williams*, 998 F.2d at 176 (emphasis added). Similarly, we described ourselves as "not reach[ing] the constitutional issues" Williams sought to raise. *Id.* (emphasis added). We vacated the district court's § 1983 ruling, rather than reversing it or remanding for further proceedings. Those holdings and

pronouncements are consistent with the prudential imperative not to resolve a constitutional issue unnecessarily. They do not suggest, as defendants state, that there can never be a § 1983 claim for violation of Title IX.

Most important here is that plaintiffs do not invoke § 1983 to redress a constitutional claim but instead a claim under federal law. Thus, the principle that courts should avoid deciding constitutional claims whenever possible is inapplicable. We therefore reject defendants' contention that our decision here is controlled by these past precedents. Instead, we hold that a § 1983 suit is not incompatible with Title VI and the Title VI regulation. At oral argument, plaintiffs' counsel recognized that at some point in the litigation it may develop that it is not necessary to maintain both the claim evolving from Title VI and the § 1983 claim, and the approach taken in *Pfeiffer* and *Williams* may be appropriate. We agree that no more is required now.

D.

Finally, the legislative intervenor defendants question the plaintiffs' standing to maintain each count of their complaint on the ground that plaintiffs' injury is not likely to be redressed by court action. In order to have standing under the Constitution, a plaintiff must show (1) an actual injury that is (2) causally connected to the conduct complained of and (3) likely to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). The injury must consist of "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical." *Id.* at 560 (citations and internal quotation marks omitted).

The legislative defendants contend that any injury the plaintiffs may have suffered is not redressable because "approximately half of the funds received by the School District are from local sources not controlled by the Executive Branch Defendants," who presumably are free to decrease their contribution for public education. Legislative Defendants' Br. at 35. The legislative defendants therefore conclude that, under those circumstances, the court's order would not redress the plaintiffs' injury, and hence they have no standing.

We reject the defendants' contention because their argument implicitly mischaracterizes plaintiffs' injury. The legislative defendants err in assuming that the injury in this case consists of a lack of adequate funding. Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court order directing the state to equalize funding between these school districts would redress this comparative injury, even if other sources of the school district's income were simultaneously reduced. We therefore conclude that the school children's injury is redressable by court order.[4]

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[4] Moreover, plaintiffs take the position that the Commonwealth is responsible for all of the School District's funding. We need not decide that issue in order to hold that plaintiffs have adequately pled standing.

The concept of standing also encompasses prudential limits on federal-court jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). Courts require plaintiffs to satisfy certain prudential concerns in an effort "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Thus, they require (1) that the injury alleged not be a "generalized grievance" that is "shared insubstantially equal measure by all or a large class of citizens," (2) that the plaintiff assert his/her own legal rights rather than those of other parties, and (3) that "the plaintiff 's complaint . . . fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (internal quotation marks omitted).

Not all plaintiffs must meet the prudential standing requirements imposed by courts. Congress may legislatively direct that standing under a particular act is to be limited only by Article III. *See Gladstone, Realtors*, 441 U.S. at 100; *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998). In such case plaintiffs may "'seek relief on the basis of the legal rights and interests of others, and . . . may invoke the general public interest'" in support of their claim. *Fair Housing Council*, 141 F.3d at 75 (*quoting Warth*, 422 U.S. at 500).

The defendants contend that the City of Philadelphia, the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and the individual officers (collectively, the "City and School District

plaintiffs") lack prudential standing because they are not asserting their own legal rights, but rather those of other parties. The legislative defendants argue that the City and School District plaintiffs are not "person[s]" within the meaning of Title VI and that, therefore these plaintiffs have no rights of their own under that statute. The District Court accepted this contention and dismissed the complaint as to the City and School District plaintiffs. The plaintiffs challenge that dismissal on appeal.

A determination of the standing of the City and School District plaintiffs at this time would involve us in a complex issue that may have no practical significance. We note in this regard that the defendants do not challenge the prudential standing of the school children, and those plaintiffs plainly meet the constitutional standing requirements. Thus, there are individual plaintiffs in this case who will carry the suit forward in any event.

Nor can there be serious question about the standing of the organization plaintiffs, which the executive defendants have not challenged. The standing of the plaintiff organizations to bring this suit is consistent with the long line of cases in which organizations have sued to enforce civil rights, civil liberties, environmental interests, etc. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 308 (1985); *Havens Realty Corp. v. Coleman* , 455 U.S. 363, 369 (1982); *Andrus v. Sierra Club*, 442 U.S. 347, 352, 353 & n.8 (1979); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994); *Medical Ctr., Inc.*, 657 F.2d at 1322.

Therefore, this situation is analogous to that presented in *Village of Arlington Heights v. Metropolitan Housing*

Development Corp., 429 U.S. 252 (1977). There, a real estate development corporation challenged the local authority's refusal to rezone a particular parcel of land to allow the construction of racially integrated housing. The Supreme Court found that the corporation met the constitutional standing requirements but was less certain that the corporation met prudential standing requirements given that the corporation had not itself been discriminated against on the basis of race. The Court held that it need not decide the prudential standing question because another of the plaintiffs, an individual, had suffered the discrimination directly. *See id.* at 264 & n.9.

We likewise conclude that we need not decide whether the City and School District plaintiffs meet prudential standing requirements because the individual school children, who have allegedly suffered discrimination directly, and the plaintiff organizations may properly bring this controversy before the federal courts.

III.

As we have stated earlier, we take no position on the merits of the allegations of the complaint. It is indeed a serious matter for plaintiffs to charge that the practices of the Commonwealth of Pennsylvania in funding public schools have a racially disparate effect. But if the charge is serious, so are the inevitable effects if the charge turns out to have merit. We need no long list of citations to note the widespread recognition of the importance of a good public school education for all of our young people -- rich and poor, black and white. Horace Mann, the great educator, wrote "Education, . . . beyond all other devices of human origin, is the great equalizer of the conditions of men, -- the balance-wheel of the social machinery."

We will reverse the order of the District Court dismissing the complaint, and remand for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 98-1223

HUTTON, J. November 18, 1998

Presently before this Court is the Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket No. 7), the Plaintiffs' response thereto (Docket No. 12), the Defendants' reply thereto (Docket No. 15), the Defendants' Supplemental Motion to Dismiss (Docket No. 25), the Motion to Dismiss of the Legislative Intervenors (Docket No. 16), the Plaintiffs' response thereto (Docket No. 18), the Brief of Legislative Intervenors for Judgment on the Pleadings (Docket No. 23), the Legislative Intervenors' Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings (Docket No. 24), and the Plaintiffs' Opposition to Intervenors' Supplemental Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss Complaint (Docket No. 26). Also before the court is the petition of the United States for leave to participate as *amicus curiae* in this action (Docket No. 13), which motion is granted and Brief of the United States as *Amicus Curiae* in Opposition to Defendant Intervenors' Motion to Dismiss or for Judgment on the Pleadings (Docket No. 20), and United States' Motion to Further Participate as *Amicus Curiae* and to Intervene of Right (Docket No. 21). For the foregoing reasons, the Plaintiffs' Complaint will be dismissed in part.

I. BACKGROUND

On March 9, 1998, Plaintiffs[1] filed the instant action "against officials of the Commonwealth of Pennsylvania who are responsible for the public education of children in the Commonwealth, including those in Philadelphia." (Pls.' Compl. 1.) Plaintiffs charge Defendants[2] with the following: (1) violating Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994), and certain regulations promulgated by the United States Department of Education's Title VI implementing requirements, 34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2) (1997) ("Title VI claims") (Count One); and (2) violating the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) (Count Two). The Federal Government provides the states with financial assistance to benefit public schools. The Commonwealth distributes these funds to Commonwealth public school districts, including the Philadelphia School District, based on a statutory funding formula. Plaintiffs allege that Defendants' statutory funding formula discriminates against the students of Philadelphia based on race, color and national origin. (Pls.' Compl. 2.) Consequently, Plaintiffs

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[1] The Plaintiffs include: "Students who attend public school in Philadelphia, their parents and guardians, and organizations that represent their interests ('Students and Organization Plaintiffs'); the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and officials who lead the School District ('School District Plaintiffs'); and the Mayor of the City of Philadelphia ('City Plaintiffs')". (Pls.' Compl. ¶ 1).

[2] The Plaintiffs have named the following parties as Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania.

seek declaratory, injunctive and other appropriate relief to stop further alleged discrimination. (Pls.' Compl. 3.)

The Plaintiffs allege that the Commonwealth's statutory public school funding formula has a disparate impact on the school children of Philadelphia, the majority of whom are poor and non-white, in violation of Title VI and § 1983. The Plaintiffs allege that over seventy-five percent of the students that the Philadelphia School District is charged with educating are non-white, that in fiscal year 1996 approximately forth-six percent of the children attending schools in the Philadelphia School District could be classified as poor because they were part of families receiving Aid to Families with Dependent Children, and that in fiscal year 1996, eighty percent of the students in the Philadelphia School District were from families eligible for free or subsidized meals. The Plaintiffs further allege that changes in the funding formula in the last several years have favored majority white school districts over majority non-white school districts.

On May 4, 1998, the Defendants filed the instant motion moving this Court for an Order dismissing the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Defendants' filed their Opposition to Defendants' Motion to Dismiss Complaint on June 17, 1998. On June 29, 1998, the Defendants filed a Reply Memorandum in Support of its Motion to Dismiss Complaint. On July 6, 1998, the Legislative Intervenors[3] filed their Motion to Dismiss. The Plaintiffs filed their response thereto on August 20, 1998.

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[3] On June 3, 1998, this Court granted the uncontested motion to intervene by movants Representative Matthew J. Ryan, Senator Robert C. Jubelirer, Representative Jess M. Stairs and Senator James J. Rhoades (collectively, the "Legislative Intervenors").

On October 7, 1998, Legislative Intervenors filed a Motion for Judgment on the Pleadings. The Legislative Intervenors filed their Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings on October 9, 1998. On October 15, the Defendants filed their Supplemental Motion to Dismiss. On November 6, 1998, the Plaintiffs filed their Motion in Opposition to Legislative Intervenors' Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss. It should also be noted that on June 13, 1998, the United States filed their Petition for Leave to Participate as Amicus Curiae in this action. They also filed a Brief as amicus curiae in opposition to Legislative Intervenors' Motion to Dismiss or for Judgment on the Pleadings and Motion to Further Participate as Amicus Curiae and to Intervene of Right on September 21, 1998.

II. DISCUSSION

A. Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure

1. Standard Under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),[4] this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

2. Analysis of Plaintiffs' Claims

In the present motion, the moving Defendants have raised four general issues. First, they assert that all of the Plaintiffs' claims are barred by the final judgment of the Commonwealth Court of Pennsylvania in Marrero by Tabales v. Com., 709 A.2d 956 (Pa. Cmwlth. Mar. 2, 1998), under the doctrine of claim preclusion. Second, they argue that the Plaintiffs have failed to state a claim under

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[4] Rule 12(b)(6) provides that:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

Title VI because any implied cause of action created by Title VI extends only to suits against institutional recipients of federal funds and not to individuals. Third, the Defendants allege that Count Two fails to state a claim under 42 U.S.C. § 1983 because Title VI's comprehensive enforcement scheme precludes the Plaintiffs' claim. Finally, they contend that the City of Philadelphia, the School District of Philadelphia, the Board of Education of the School District of Philadelphia, Edward G. Rendell, David W. Hornbeck and Floyd W. Alston are not "persons" protected by Title VI. The Court will address each of the Defendants' arguments in turn.

a. Res Judicata

The doctrine of res judicata, or claim preclusion, gives a prior judgment dispositive effect, and bars subsequent litigation based on any claim that was, or could have been, raised in the prior proceeding. See Board of Trustees of Trucking Employers v. Centra, 983 F.2d 495, 504 (3d Cir. 1992). This is true regardless of whether the prior decision was correctly decided, see, e.g., Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981), as the doctrine exists precisely to draw the line at which the priorities of the legal system shift from accuracy to finality. The doctrine accepts the risk of inaccuracy in the individual case in exchange for what courts have determined to be greater benefits--repose and the reliability of final judgments over time, and across the entire legal system. See generally 18 Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure 4403 (2d ed. 1996).

To establish the affirmative defense of res judicata, the party asserting it must establish that: (1) the first suit resulted in a final judgment on the merits; (2) the second

suit involves the same parties or their privies; and (3) the second suit is based on the same cause of action as the first. See United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984); Harding v. Duquesne Light Co., 1995 WL 916926, *2 (W.D. Pa. Aug. 4, 1995). The Plaintiffs argue that Marrero was not a decision on the merits, that this matter does not involve the same parties as in Marrero or the same cause of action. (See Pls.' Mot. in Opp'n. at 10.). In sum, the Plaintiffs argue that the Defendants fail to satisfy even one of the three elements necessary to successfully assert claim preclusion. (Id.)

Collateral estoppel is inappropriate because the Defendants fail to satisfy the first requirement set forth in Athlone, thus, this Court need not consider the Defendants' other arguments. Athlone, 746 F.2d at 983. The Commonwealth Court's "Order" in Marrero was not a "final judgment on the merits." See Marrero, 709 A.2d at 966. Indeed, the court dismissed the action for presenting a nonjusticiable political question only after stating that "we are precluded from addressing the merits of the claims underlying the instant action as the resolution of those issues have been solely committed to the discretion of the General Assembly Under Article 3, Section 14 of the Pennsylvania Constitution." Id. Clearly, the court never reached the merits of the Plaintiffs' civil rights claims. The doctrine of res judicata does not apply where, as here, the court did not render a final adjudication on the merits of the prior action. See Wade v. City of Pittsburgh, 765 F.2d 405, 410 (3d Cir. 1985) (finding that a state court decision granting summary judgment to a municipality on the basis of statutory immunity did not preclude a subsequent federal action on the same incident); Superior Oil Co. v. City of Port Arthur, Tex., 553 F. Supp. 511, 512 (E.D. Tx. 1982) (holding that the lower court's finding that the claim

presented a political question was a jurisdictional decision, thus not a judgment on the merits and will not serve as a bar under res judicata principles), rev'd on other grounds, 726 F.2d 203 (5th Cir. 1984); see also Talley v. Southeastern Pennsylvania Transp. Auth., No. CIV. A.93-3060, 1993 WL 496702, at *3 (E.D. Pa. Nov. 30, 1993) (holding that res judicata does not apply to bar second cause of action where prior wrongful termination action was dismissed with prejudice for failure to exhaust administrative remedies) (citing Solar v. Merit Sys. Protection Bd., 600 F. Supp. 535, 536 (S.D. Fla. 1984) (same)).

b. Title VI of the Civil Rights Act of 1964

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Section 602 of Title VI, 42 U.S.C. § 2000d-1, instructs federal agencies to promulgate regulations interpreting Title VI. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 340 (1978) (Brennan, J., concurring and dissenting). The statute conditions an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds. See Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 599 (1983) (opinion of White, J.); id., at 609 (Powell, J., concurring in judgment); cf., Pennhurst State

School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). The ultimate sanction for non-compliance is the termination of financial assistance. 42 U.S.C. § 2000d-1. The "primary objective" of Title VI is to ensure "that funds of the United States are not used to support racial discrimination" but "are spent in accordance with the Constitution and the moral sense of the Nation." Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 (1984) (citing 110 Cong. Rec. 6544 (1964) (remarks of Sen. Humphrey)).

The Defendants assert that Count I fails to state a claim because any implied cause of action created by Title VI extends only to suits against institutional recipients of federal funds and not to individuals. The Defendants argue that the Plaintiffs' Complaint is fatally flawed because it names Defendants Ridge, Gallagher, Hickok and Hafer. This Court must disagree.

In their Complaint, the Plaintiffs allege to sue Defendants Ridge, Gallagher, Hickok and Hafer in their official and individual capacities, but assert that they seek only injunctive and declaratory relief against the Defendants in their individual capacities. (Pls.' Complaint ¶¶ 27, 28, 29, 30 and 31.) The Plaintiffs allege that these Defendants are the key Pennsylvania officials who accept federal financial assistance for public school education, thereby incurring the obligations of Title VI and its regulations. (Id.) The Plaintiffs contend that these officials choose, set and administer the policies and practices of public education finance in Pennsylvania, which discriminate on the basis of race, color and national origin. (Id.) The Court finds that the Plaintiffs' suit against Defendants Ridge, Gallagher, Hickok and Hafer in their official capacities "is no different from a suit against the

State itself." Hafer v. Melo, 502 U.S. 21, 26 (1991); see discussion infra Part II.B.4.b.

c. 42 U.S.C. 1983

In Count Two of their Complaint, the Plaintiffs assert that the Defendants have violated § 1983 by discriminating on the basis of race, color or national origin in the educational opportunities and funding system they provide. The Defendants make two arguments challenging the validity of the Plaintiffs' claims arising under § 1983. First, the Defendants argue that the Plaintiffs cannot assert a claim under § 1983 based on Title VI because such a claim is precluded by Title VI's comprehensive enforcement scheme. Second, the Defendants assert that the Plaintiffs cannot circumvent the requirements of a Title VI claim by asserting a § 1983 claim based upon a violation of Title VI. This Court finds that the Plaintiffs have failed to satisfy a prima facie case under § 1983, and therefore are not entitled to protection under that statute.

A § 1983 action has two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983.[5] Neither a state nor its officials acting in their

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[5] Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or

official capacities are "persons" under §1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Moreover, "governmental entities that are considered 'arms of the State'" are not persons under 1983. Id. at 70.

In Fitchik v. New Jersey Transit Rail Operations, Inc., the United States Court of Appeals for the Third Circuit listed the factors a court must consider when determining whether an entity is an "arm of the State" under Will:

> (1) Whether the money that would pay the judgment would come from the state (this includes three . . . factors-whether payment would come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
> (2) The status of the agency under state law (this includes four factors-how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
> (3) What degree of autonomy the agency has.

873 F.2d 655, 659 (3d Cir.), cert. denied, 493 U.S. 850 (1989); see Bolden v. SEPTA, 953 F.2d 807, 814-16 (3d Cir. 1991), cert. denied, 504 U.S. 943 (1992). The Third Circuit has "repeatedly held that the most important factor in determining whether an entity is an 'arm of the State' . . .

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other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

is 'whether any judgment would be paid from the state treasury.'" Independent Enters., Inc. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1172 (3d Cir. 1997) (quoting Fitchik, 873 F.2d at 659).

In the instant case, the Plaintiffs have named the following parties as Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania. Suits against state officials in their official capacity should be treated as suits against the State. See Hafer v. Melo, 502 U.S. 21, 26 (1991) (finding that although state officials literally are persons, an official-capacity suit against a state officer "is not a suit against the official but rather is a suit against the official's office"); Monell, 436 U.S. at 690 n.55 (finding that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which a local government would be suable in its own name); see also Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1143, n.3 (3d Cir. 1995) (finding that a suit against the individual defendants in their official capacities is the same as a suit against the Pennsylvania Turnpike Commission). As officials of the Commonwealth of Pennsylvania who have been sued for actions taken while in their official capacities, Ridge, Hickok and Hafer are not "persons" under § 1983. Furthermore, because the Board of Education's ("Board's") funding comes directly from the Commonwealth of Pennsylvania, neither the Board nor Gallagher are "persons" under § 1983. See 61 Pa. Cons. Stat. Ann. 331.2 (West Supp. 1996); 71 Pa. Cons. Stat. Ann. 230(b) (West 1990). "[T]he Board enjoys no

financial independence from the Commonwealth." Ahmad v. Burke, 436 F. Supp. 1307, 1311 (E.D. Pa. 1977). Accordingly, any judgment against the Board would be "paid from the state treasury." This weighs heavily in favor of the Board's "being considered 'an arm of the State.'" Independent Entrs., 103 F.3d at 1173.

Moreover, the second and third factors also weigh in favor of this conclusion. Pennsylvania courts have found that the Board enjoys sovereign immunity. Reiff v. City of Philadelphia, 365 A.2d 1357, 1358 (Pa. Commw. Ct. 1976). Moreover, "[t]he Board's powers, in short, are not those of an agency 'sufficiently distinct and independent from the state as not to be considered a part of the state.'" Ahmad, 436 F. Supp. at 1311 (quoting Flesch v. Eastern Pennsylvania Psychiatric Inst., 434 F. Supp. 963, 976 (E.D. Pa. 1977)).

Accordingly, this Court finds that the Board is an "arm of the State," and thus neither the Board nor Gallagher, its Chairperson, are persons under § 1983. As Judge Edmond V. Ludwig recently stated:

> plaintiff's claim against the Pennsylvania Board of Probation and Parole must be dismissed. As an agency of the Commonwealth of Pennsylvania, a suit against the Board of Probation and Parole is, in essence, a suit against the Commonwealth. The Supreme Court has held that a state may not be sued under § 1983 for either damages or injunctive relief. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); see also Abdul-Akbar v. Watson, 775 F. Supp. 735 (D. Del. 1991).

Carotenuto v. Angelli, No.CIV.A.95-1981, 1995 WL 217619, at * 1 (E.D. Pa. Apr. 12, 1995); See Kubis v. Pennsylvania Bd. of Probation and Parole, No.CIV.A.95-5875, 1996 WL 253324, at * 4 (E.D. Pa. May 14, 1996); McCullough v. Pennsylvania Bd. of Probation and Parole, No.CIV.A.85-1640, 1985 WL 2843, at *1 (E.D. Pa. Oct. 2, 1985) (finding Board "is not a 'person' for purposes of 1983 action" and "as a state agency . . .is protected by the Eleventh Amendment"). Therefore, the Plaintiffs' claims against the Defendants under § 1983 must be dismissed.

d. Persons Protected Under Title VI

The Defendants do not challenge the standing of the Students and Organization Plaintiffs to sue under Title VI. The Defendants, however, challenge the standing of the City and School District Plaintiffs. The Defendants argue that the City of Philadelphia, the School District of Philadelphia and the Board of Education of the School District of Philadelphia are political subdivisions, and therefore not entitled to protection under Title VI. Furthermore, the Defendants argue that Edward G. Rendell, David W. Hornbeck and Floyd W. Alston have brought their purported claims in their official capacities, not in their individual capacities. The Defendants contend that because these Plaintiffs are suing only in their official capacities, they have no greater ability to proceed against the Defendants than the political subdivisions they represent. This Court must agree.

To this Court's knowledge, the Third Circuit has not yet considered the issue of whether Title VI creates a non-private cause of action. See District of Philadelphia v. Pennsylvania Milk Marketing Bd., 877 F. Supp. 245, 251 n.3 (E.D. Pa. 1995) (stating that the Third Circuit had not

yet decided whether a school district would be permitted to sue the state for Constitutional violations). Further, the Third Circuit has not yet decided whether a city has standing under Title VI to sue the state. This Court, therefore, looks to other circuits for guidance.

The Eleventh Circuit has stated that "[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute." United States v. Alabama, 791 F.2d 1450, 1454 (11th Cir. 1986) (finding that state university has no standing to sue under Title VI); see DeKalb County School Dist. v. Schrenko, 109 F.3d 680, 689 (11th Cir. 1997) (finding that political subdivision of a state, such as the DeKalb County School District and its Board of Education, may not maintain a suit for a breach of Title VI against the State in federal court). See also Stanley v. Darlington County School Dist., 84 F.3d 707, 717 n.2 (4th Cir. 1995) (holding that Title VI does not authorize a political subdivision of a state to sue the state itself).

Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation. Alabama, 791 F.2d at 1454 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 696-97 (1978)). "Absent any indication of Congressional intent to grant additional rights under this statute to [political subdivisions] against the state, [this Court] declines to infer such a right of action by judicial fiat." Id. In the instant matter, the City of Philadelphia, the School District of Philadelphia and the Board of Education of the School District of Philadelphia are political subdivisions. Accordingly, they are not "persons" under Title VI, and their claims must therefore be dismissed

pursuant to Rule 12(b)(6). Furthermore, Rendell, Hornbeck and Alston have brought their purported claims in their official capacities, not in their individual capacities. (See Pls.' Complaint ¶¶ 20, 25.) Because they have sued the Defendants in their official capacities, they have no more standing under Title VI than the political subdivisions that they represent. Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (finding that the Consul General, acting only in his official capacity, had no greater ability to proceed under § 1983 than did the country he represented). Similarly, the City and School Plaintiffs are not "persons" under Title VI, and their claims must therefore be dismissed pursuant to Rule 12(b)(6).

B. Motion to Dismiss or for Judgment on the Pleadings of Intervenors Jubelirer, Ryan, Rhoades and Stairs

1. Standard of Review Under Rule 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district court can grant a dismissal based on the legal insufficiency of a claim. Dismissal is proper only when the claim clearly appears to be either immaterial and solely for the purpose of obtaining jurisdiction, or is wholly insubstantial and frivolous. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). When the subject matter jurisdiction of the court is challenged, the party that invokes the court's jurisdiction bears the burden of persuasion. Kehr Packages, 926 F.2d at 1409 (citing Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)). Moreover, the district court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. McCarthy v. United States, 850

F.2d 558, 560 (9th Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1052 (1989).

2. Standard of Review Under Rule 12(b)(6)

See discussion supra Part II.A.1.

3. Standard of Review Under Rule 12(c)

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is treated under the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 376-77 (E.D. Pa. 1995), aff'd, 91 F.3d 125 (3d Cir.) (table), cert. denied, 117 S. Ct. 435 (1996); Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993). Consequently, judgment under Rule 12(c) will only be granted where the moving party has clearly established that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Regalbuto, 937 F. Supp. at 377 (citing Inst. for Scientific Info., Inc. v. Gordon and Breach, Science Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir.), cert. denied, 502 U.S. 909 (1991)). Additionally, the district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Regalbuto, 937 F. Supp. at 377 (citing Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993)).

4. Analysis of Plaintiffs' Claims

In their Brief in support of their Supplemental Motion for Judgment on the Pleadings, the Legislative Intervenors allege that Count One of the Complaint fails to state a

claim because § 602 of Title VI does not allow a private cause of action and none should be implied. In their Motion for Judgment on the Pleadings, the Legislative Intervenors assert that the Eleventh Amendment bars the Plaintiffs' claims against the Defendants in their official capacities. The Legislative Intervenors also argue that the Complaint fails to state a claim for disparate impact under existing caselaw. First, the Court will consider whether a private cause of action exists under Title VI. Second, the Court will review whether the Claim brought by the Plaintiffs is barred by the Eleventh Amendment. Finally, the Court will consider whether the Complaint sucessfully states a claim for disparate impact under Title VI.

a. Private Cause of Action

The Supreme Court has stated that it is a "widely accepted assumption that Title VI creates a private cause of action." Cannon v. Univ. of Chicago, 441 U.S. 677, 703 n.33 (1979). In Cannon, the Court found that Title IX of the Education Amendments of 1972 created a private right of action for victims of discrimination in education. Id. at 703. In making that holding, the Court stated that it had "no doubt that Congress ... understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." Id. The Cannon Court recognized that Title IX of the Civil Rights Act of 1964 "was patterned after Title VI...." Id. at 694. "Thus, the courts have consistently held the language of Cannon to be applicable in discussions of Title VI." Chowdhury v. Reading Hosp. & Med. Center, 677 F.2d 317, 320 (3d Cir. 1982) (citing Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981); Camenisch v. Univ. of Texas, 616 F.2d 127 (5th Cir. 1980), vacated on other

grounds and remanded, 451 U.S. 390 (1981); N.A.A.C.P. v. Med. Ctr., Inc., 599 F.2d 1247 (3d Cir. 1979)).

The Third Circuit recently confirmed that "[a] private right of action exists under section 601, but this right only reaches instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact." Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 929 (3d Cir. 1997). In this case, Plaintiffs allege discrimination solely on the basis of disparate impact. (See Pls.' Complaint at 1.) Therefore, Plaintiffs cannot avail themselves of a private right of action under § 601.

Plaintiffs do not specify, however, whether the Complaint should be read to imply a cause of action pursuant to § 601 or § 602 of Title VI. Section 602 authorizes and directs federal agencies to promulgate regulations implementing the provisions of § 601. See 42 U.S.C. § 2000d-1. Pursuant to § 602, the Department of Education issued regulations which provide in relevant part:

> Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin: (I) Deny an individual any service, financial aid, or other benefit provided under the program; (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program .... (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which

> will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2).

Although the Plaintiffs' Complaint does not actually cite either § 601 or § 602, as Judge Easterbrook of the Seventh Circuit observed: "Instead of asking whether the complaint points to the appropriate statute, a court should ask whether the relief is possible under any set of facts that could be established consistent with the allegations." Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992) (citing, e.g., Conley v. Gibson, 355 U.S. 41 (1957)); see Fed. R. Civ. P. 8. Thus, this Court reads the Complaint to assert a cause of action under § 602.

The Legislative Intervenors contend that, like § 601, § 602 does not afford the Plaintiffs a private right of action. In Alexander, the Supreme Court interpreted Guardians as holding that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title

VI." Alexander, 469 U.S. at 293. In Chester Residents, however, the Third Circuit determined that neither Guardians nor Alexander definitively settled the availability of a private right of action under § 602.

Nevertheless, after conducting its own analysis, the Third Circuit concluded that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Chester Residents, 132 F.3d 925, 937. Pursuant to § 602, the Department of Education has issued regulations providing a private cause of action based on discriminatory impact. See 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3). (prohibiting certain actions "which have the effect" of discriminating); see also Elston v. Talledega County Bd. of Educ., 997 F.3d 1394, 1407 n.12 (11th Cir. 1993) (evaluating merits of disparate impact claim under 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3)). Consequently, the Plaintiffs' claim of discrimination by disparate impact under § 602 and 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3) will not be dismissed under the theory that Title VI does not create a private cause of action.

b. Eleventh Amendment Immunity

The Eleventh Amendment bars suits against the State both when it is the named party and when it is the party in fact. Scheuer v. Rhodes, 416 U.S. 232, 237 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the state itself." Will, 491 U.S. at 71.

In Ex parte Young, the Supreme Court recognized an exception for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. Ex parte Young, 209 U.S. 123 (1908). The Court has also stated that the exception to the Eleventh Amendment immunity established in Ex parte Young, also permits suits against state officials in their official capacities for ultra vires acts. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 26 (1989). In a recent case, the Supreme Court emphasized "the continuing validity of the Ex parte Young doctrine" and the "presumption" that "in most cases" when a plaintiff seeks prospective relief in federal court against state officers "ordinarily" the Eleventh Amendment is no bar. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 2034, 2038, 2040 (1997).

The Plaintiffs claim that the Eleventh Amendment does not bar their suit as one against the State because their case falls within the Ex parte Young exception to Eleventh Amendment immunity. The Plaintiffs claim that because they sue the Defendants in both their individual and official capacities, and seek to preclude the Defendants from continuing violations of federal law, their suit falls within the exception to Eleventh Amendment immunity established in Ex parte Young. This Court must agree.

Accepting as true the facts alleged in the Complaint and all reasonable inferences that can be drawn from them as proscribed by Rule 12(b)(6), this Court must find that the instant action is solely an official capacity suit. The distinction between official-capacity and personal-capacity suits is, by all accounts, a difficult one. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("[T]his distinction

apparently continues to confuse lawyers and lower courts.").

> [T]he distinction between official-capacity suits and personal-capacity suits is more than "a mere pleading device." . . . State officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them . . . . By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person."

Hafer v. Melo, 502 U.S. 21, 27 (1991).

The Supreme Court has stated that official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 690, n.55 (1978)). Suits against state officials in their official capacity therefore should be treated as suits against the State. See Hafer v. Melo, 502 U.S. 21, 26 (1991) (finding that although state officials literally are persons, an official-capacity suit against a state officer "is not a suit against the official but rather is a suit against the official's office"); Monell, 436 U.S. at 690 n.55 (finding that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which a local government would be suable in its own name); see also Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1143, n.3 (3d Cir. 1995) (finding that a suit against the individual defendants in their official capacities is the same as a suit against the Pennsylvania Turnpike Commission).

Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. Graham, 473 U.S. at 165 (citing Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(1)). Thus, the Plaintiffs' suit against Defendants Ridge, Gallagher, Hickok and Hafer in their official capacities "is no different from a suit against the State itself." Hafer, 502 U.S. at 26; see Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (finding that action brought by Consul General, acting only in his official capacity, could be nothing other than an official capacity suit); Byrd v. Raines, 521 U.S. 811, 2323 (1997) (Souter, J., concurring) (stating that "the Court is certainly right in concluding that appellees sue not in personal capacities, but as holders of seats in the Congress"); Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1057 (1997) (upholding the district court's ruling that suit brought against the Governor in her individual and official capacities was an official capacity suit).

A plaintiff can, however, bring a claim against a state official in his or her official capacity despite the Eleventh Amendment if the plaintiff is seeking prospective injunctive relief. See Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 676-77 (1974); Ex Parte Young, 209 U.S. at 155- 56; Helfrich v. Commonwealth of Pennsylvania Dept. of Military Affairs, 660 F.2d 88, 90 (3d Cir.1981); Eckford-El v. Toombs, 760 F. Supp. 1267, 1270 (W.D. Mi.1991). Such claims are allowed because of the legal fiction that the officer being enjoined has acted in an ultra vires fashion, and is therefore not really acting in an "official capacity." See Papasan v. Allain, 478 U.S. 265, 276 (1986) (stating that Ex Parte Young "was based on a determination that an unconstitutional state enactment is void and that any action

by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity."); Benning v. Bd. of Regents of Regency Univs., 928 F.2d 775, 778 (7th Cir. 1991) ("In Ex Parte Young, the Supreme Court authorized a federal court injunction against a state official based upon the theory that his violation of federal law stripped him of his official authority."); Laskaris v. Thornburgh, 661 F.2d 23, 26 (3d Cir. 1981); cf. Ex Parte Young, 209 U.S. at 159.

In the instant matter, the Plaintiffs have made claims for injunctive relief. It is not clear at this juncture whether such relief would truly be prospective and therefore not barred by the Eleventh Amendment. See Papasan, 478 U.S. at 278; Hutto v. Finney, 437 U.S. 678, 690 (1978) ("the difference between retroactive and prospective relief 'will not in many instances be that between day and night.'") (quoting Edelman v. Jordan, 415 U.S. 651, 667 (1974); Laskaris, 661 F.2d at 26; cf. Benning, 928 F.2d at 778. Accordingly, at this juncture, this Court cannot find that the Plaintiffs' claims are barred by the Eleventh Amendment.

c. Disparate Impact

The Plaintiffs base their claim on the federal Department of Education's regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, et seq. In their Complaint, the Plaintiffs allege discrimination solely on the basis of disparate impact. (See Pls.' Complaint at ¶ 1.) The Plaintiffs assert, in substance, that the discriminatory impact arises because the uniformly applied state formula for allocating basic education funds among the 501 school districts does not bring about the

same result in Philadelphia as it might in another, more affluent district, because of Philadelphia's special needs. The Plaintiffs' factual allegations, even when assumed to be true for purposes of this motion, do not, as a matter of law, state a disparate-impact claim. The Plaintiffs' Complaint is merely a "we-need-more-money" allegation of a type that has been held non-actionable.

Courts considering claims under analogous Title VI regulations have held that a plaintiff alleging discrimination in program receiving federal financial assistance must make prima facie showing that alleged conduct has a disparate impact. See New York Urban League, Inc. v. State of N.Y., 71 F.3d 1031, (2d Cir. 1995) (citing Civil Rights Act of 1964, 601, 42 U.S.C.A. 2000d); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). "A plaintiff alleging a violation of the [Department of Education] regulations must make a prima facie showing that the alleged conduct has a disparate impact." See Georgia State Conference, 775 F.2d at 1417.

"[A] plaintiff may establish a prima facie case of disparate impact by showing that use of the test causes the selection of applicants ... in a racial pattern that significantly differs from that of the pool of applicants." Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir.). Such a showing can be established through the use of statistical evidence which discloses a disparity so great that it cannot reasonably be attributed to chance. See Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977). To establish a prima facie case, the statistical disparity must be sufficiently substantial to raise an inference of causation. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988).

In Alexander v. Choate, 469 U.S. 287 (1985), the Supreme Court applied section 504 of the Rehabilitation Act to a factual situation somewhat similar to that presented here. In that case, Tennessee had reduced from 20 to 14 the number of inpatient hospital days per year that it would reimburse hospitals on behalf of a Medicaid recipient. Statistical evidence showed that disabled persons were more likely than non-disabled persons to require more that 14 days of hospitalization per year, and accordingly challenged the reduction as violative of section 504. The Supreme Court first assumed that a disparate impact would be sufficient to state a claim under section 504. See id. at 299. It held, however, that section 504 requires that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." Id. at 301 (emphasis added). The Court noted that the benefit itself "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." Id.

Applying these standards, the Court determined that the relevant benefit was the 14-day period of covered hospitalization. The Court upheld the benefit limitation, reasoning that it "does not exclude the handicapped from or deny them the benefits of the 14 days of care the State has chosen to provide." Alexander, 469 U.S. at 302. "The reduction in inpatient coverage will leave both handicapped and non-handicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation." Id.

In the instant case, the Plaintiffs do not assert that the Executive Branch Officers calculate funding for the School District any differently than they calculate it for other districts or that the School District receives any less Commonwealth funding than other school districts. Rather, the Plaintiffs want the School District to get more than the statutory formula provides under the theory that factors external to the state subsidy program make education more expensive or funding shortfalls greater in Philadelphia. Under Alexander, this scenario does not state a cause of action for disparate impact. See Alexander, 469 U.S. at 287; see also Cercpac v. Health and Hospitals Corp., 147 F.3d 165, 167 (2d Cir. 1998) (stating that "the disabled do not have a right to more public services than the non-disabled, even if the disabled need them") (quoting Lincoln Cercpac v. Health and Hospital Corp., 977 F. Supp. 274, 280 (S.D. N.Y. 1997)). Likewise, "the [School District] do[es] not have a right to more public services than [other school districts], even if the [School District] need[s] them." Id. Accordingly, the Plaintiffs' claims arising under Title VI and its implementing regulations are dismissed for failure to state a claim.

C. Petition of the United States for Leave to Participate

The United States has filed a petition for leave to participate in this action as amicus curiae. The United States alleges that it has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by private parties. In the interest of justice this Court shall grant the petition.

An appropriate Order follows.

FINAL JUDGMENT

AND NOW, this 18th day of November, 1998, upon consideration of the Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket No. 7), the Plaintiffs' response thereto (Docket No. 12), the Defendants' reply thereto (Docket No. 15), the Defendants' Supplemental Motion to Dismiss (Docket No. 25), the Motion to Dismiss of the Legislative Intervenors (Docket No. 16), the Plaintiffs' response thereto (Docket No. 18), the Brief of Legislative Intervenors for Judgment on the Pleadings (Docket No. 23), the Legislative Intervenors' Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings (Docket No. 24), and the Plaintiffs' Opposition to Intervenors' Supplemental Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss Complaint (Docket No. 26); also before the court is the petition of the United States for leave to participate as amicus curiae in this action (Docket No. 13), Brief of the United States as Amicus Curiae in Opposition to Defendant Intervenors' Motion to Dismiss or for Judgment on the Pleadings (Docket No. 20), and United States' Motion to Further Particpate as Amicus Curiae and to Intervene of Right (Docket No. 21), IT IS HEREBY ORDERED that:

(1) all claims arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994), and certain regulations promulgated by the United States Department of Education's Title VI implementing requirements, 34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2) (1997) ("Count One") brought by the Plaintiffs[6] against

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[6] The Plaintiffs include: "Students who attend public school in

Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania are DISMISSED with prejudice;

(2) all claims brought by the Plaintiffs arising under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) ("Count Two") against Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania are DISMISSED with prejudice; and

(3) the motion of the United States for leave to participate as amicus curiae in this action is GRANTED.

BY THE COURT:

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HERBERT J. HUTTON, J.

Philadelphia, their parents and guardians, and organizations that represent their interests ('Students and Organization Plaintiffs'); the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and officials who lead the School District ('School District Plaintiffs'); and the Mayor of the City of Philadelphia ('City Plaintiffs')". (Pls.' Compl. ¶ 1).

APPENDIX C

SECTION 601 OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Section 2000d. Prohibition against exclusion from participation in denial of benefits of, and discrimination under federally assisted programs on ground of race, color or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

APPENDIX D

SECTION 602 OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec. 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law:

Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

APPENDIX E

SECTION 100.3 OF TITLE 34 OF THE CODE OF FEDERAL REGULATIONS

Sec. 100.3 Discrimination prohibited. (a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies. (b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin: (i) Deny an individual any service, financial aid, or other benefit provided under the program; (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program; (vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee

but only to the extent set forth in paragraph (c) of this section). (vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program. (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. (3) In determining the site or location of facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation. (4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance. (5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section. (6)(i) In administering a

program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination. (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. (c) Employment practices. (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective: (A) Projects under the Public Works Acceleration Act, Pub. L. 87-658, 42 U.S.C. 2641-2643. (B) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374. (C) Programs assisted under laws listed in appendix A as respects

employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments. (D) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b. (2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it. (3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries. (d) Indian health and Cuban refugee services. An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his. (e) Medical emergencies. Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical

institution which refuses or fails to comply with paragraph (a) of this section.

(Authority: Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d-1, 2000d-3)

APPENDIX F

SECTION 100.7 OF TITLE 34 OF THE CODE OF FEDERAL REGULATIONS

Sec. 100.7 Conduct of investigations. (a) Periodic compliance reviews. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part. (b) Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee. (c) Investigations. The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part. (d) Resolution of matters. (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in Sec. 100.8. (2) If an investigation does not warrant action pursuant to

paragraph (1) of this paragraph (d) the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing. (e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

APPENDIX G

PENNSYLVANIA BASIC EDUCATION FUNDING FORMULA FOR 1997-1998 SCHOOL YEAR

For the 1997-1998 school year, the Commonwealth shall pay to each school district a basic education funding allocation which shall consist of the following:

(1) An amount equal to the basic education funding allocation for the 1996- 1997 school year pursuant to section 2502.33.[1]

(2) A base supplement payable to qualifying school districts.

(i) To qualify for the base supplement, a school district's 1998-1999 market value/income aid ratio must be equal to or greater than four thousand ten-thousandths (0.4000).

(ii) The base supplement is calculated for qualifying school districts as follows: multiply the school district's 1998-1999 market value/income aid ratio times its 1997-1998 average daily membership; multiply this product times eighty-five million five hundred thousand dollars ($85,500,000); divide the resultant product by the sum of the products of the 1998-1999 market value/income aid ratio times the 1997-1998 average daily membership for all qualifying districts.

(3) A growth supplement is calculated for qualifying school districts as follows: multiply the increase in average daily membership between the 1996- 1997 and 1997-1998 school years times four hundred dollars ($400).

(4) A poverty supplement to qualifying school districts.

(i) To qualify for the poverty supplement, the number of children in low-income families residing in the district for the 1997 calendar year divided by the district's average daily membership for the 1997-1998 school year must be greater than or equal to ten per centum (10%).

(ii) The poverty supplement is calculated for qualifying school districts by multiplying the number of children in low-income families as defined in section 2501(21)[2] residing in the district for the 1997 calendar year times fifty dollars ($50).

(5) Each school district will be guaranteed a minimum increase to be calculated as follows:

(i) Each school district with a 1998-1999 market value/income aid ratio equal to or greater than seven thousand ten-thousandths (0.7000) will receive additional funding, as necessary, so that the sum of the amounts in clauses (2), (3), (4) and (5) will equal at least four per centum (4%) of the amount in clause (1).

(ii) Each school district with a 1998-1999 market value/income aid ratio less than seven thousand ten-thousandths (0.7000) will receive additional funding, as necessary, so that the sum of

the amounts in clauses (2), (3), (4) and (5) will equal at least one per centum (1%) of the amount in clause (1).

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[1] 24 P.S. § 25-2502.33.

[2] 24 P.S. § 25-2501(21).